
IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

ZACHARY R. E. RUSK,

Plaintiff,

v.

FIDELITY BROKERAGE SERVICES,

Defendant.

**MEMORANDUM DECISION AND
ORDER DENYING MOTION TO
APPOINT COUNSEL & MOTION FOR
ORDER REQUIRING DEFENDANT TO
MAINTAIN EVIDENCE
(ECF NO. 75)**

Case No. 2:15-cv-00853-JNP-EJF

District Judge Jill N. Parrish

Magistrate Judge Evelyn J. Furse

Plaintiff Zachary R. E. Rusk moves the Court¹ to appoint counsel and to order Defendant Fidelity Brokerage Services (Fidelity) to maintain evidence. (Mot. (2 part) (Mot.), ECF No. 75.) For the following reasons, the Court denies Mr. Rusk's motions.

Motion to Appoint Counsel

This Motion constitutes Mr. Rusk's second motion to appoint counsel. On January 26, 2016, Judge Wells granted in part Mr. Rusk's first motion to appoint counsel. (ECF No. 19.) In her Order, Judge Wells agreed to appoint counsel "for the limited purpose of consulting with Plaintiff and assisting Plaintiff in determining whether he has a cognizable claim." (ECF No. 19.) However, on May 31, 2016, Judge Warner reconsidered Mr. Rusk's motion to appoint

¹ Magistrate Judge Paul Warner referred this case to the undersigned Magistrate Judge following his recusal. (ECF No. 77.)

counsel because, “the court has been unable to find any counsel willing to represent Plaintiff, even in the limited role envisioned by Judge Wells.” (Mem. Dec. & Order 3, ECF No. 44.)

Judge Warner considered three factors before denying Mr. Rusk’s motion to appoint counsel.

(*Id.*) First, Mr. Rusk failed to show that his claim has sufficient merit to warrant appointment of counsel. (*Id.* at 4.) Second, Mr. Rusk provided no indication that he lacks the capacity or otherwise cannot pursue his case. (*Id.*) And third, the issues raised by Mr. Rusk’s Complaint do not appear complicated or difficult to explain. (*Id.*) Accordingly, Judge Warner denied Mr. Rusk’s first motion to appoint counsel.

Mr. Rusk once again asks this Court to appoint counsel. However, this Court finds the circumstances of Mr. Rusk’s case have not changed since Judge Warner issued his Order denying Mr. Rusk’s motion to appoint counsel. Therefore, the Court DENIES Mr. Rusk’s motion to appoint counsel.

Motion to Order Defendant to Maintain Evidence


Mr. Rusk “seeks an order to require the defendant and its constituents, corroborators and colluders in this case to maintain any and all evidence.” (Mot. 2, ECF No. 75.) “A party’s duty to preserve evidence arises when the party ‘knew, or should have known, that litigation was imminent.’” *Brigham Young Univ. v. Pfizer, Inc.*, 282 F.R.D. 566, 571 (D. Utah 2012) (*quoting Turner v. Pub. Serv. Co.*, 563 F.3d 1136, 1149 (10th Cir. 2009)). A failure to preserve evidence can result in sanctions. *See Fed. R. Civ. P. 37(e).*

Fidelity’s duty to preserve evidence relevant to this matter arose either when it knew or should have known that litigation was imminent and no later than when the Clerk filed Mr. Rusk’s Complaint on December 15, 2015. (ECF No. 4.) Mr. Rusk does not provide this Court

with any evidence that Fidelity has violated its duty. Therefore, the Court DENIES Mr. Rusk's Motion to order Fidelity to maintain evidence as unnecessary.

DATED this 24th day of April, 2017.

BY THE COURT:



EVELYN J. FORSE
United States Magistrate Judge